No. 83-1437

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE

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TABLE OF AUTHORITIES

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OTHER AUTHORITIES:

STATUTES INVOLVED

United States Code, Title 42, §1988 as amended. Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the

Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of §1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

United States Code, Title 28, Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice

that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

QUESTION PRESENTED

Whether a plaintiff is entitled to recover his attorney's fees under Title 42 U.S.C.§1988 for work performed after a valid offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, when plaintiff has rejected the offer and at trial has recovered less than the offered amount.

STATEMENT OF INTEREST

State of Florida, ex rel., Jim Smith, Attorney General, pursuant to Rule 36, Rules of the Supreme Court of the United States, files its Amicus Curiae Brief in support of arguments presented by Petitioners Jeffrey Marek, Thomas Wadycki, and Lawerence Rhode.

As a frequent defendant in civil rights litigation, the State has an interest in having available a fair and reasonable method for resolving civil rights litigation through settlement. If the decision of the court of appeals is not reveresed, the State's ability to resolve civil rights litigation through settlement will be severely impaired.

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BRIEF OF AMICUS CURIAE STATE OF FLORIDA EX REL. JIM SMITH, ATTORNEY GENERAL

OPINIONS BELOW

The opinion of the court of appeals is reported at 720 F.2d 474. The opinion of the district court is reported at 547 F. Supp. 542.

SUMMARY OF ARGUMENT

Rule 68, Fed.R.Civ.P., encourages settlement of lawsuits by shifting the burden of costs when a plaintiff has rejected an offer of judgment, but at trial recovers less than offered. 42 U.S.C. §1988 permits attorney's fees to be awarded as part of costs to prevailing parties in civil rights litigation. Due to §1988's designation of attorney's fees as costs, in a civil rights action, an offer of judgment should include an offer to pay attorney's fees accrued. If a plaintiff rejects the offer of judgment, and then recovers less than the offered amount, defendants should be entitled to the benefit of Rule 68 and plaintiff should not be allowed to recover attorney's fees for the unnecessary post-offer legal work.

The decision of the court of appeals permitting plaintiff to recover his full attorney's fees in this situation is erroneous, unsupported by the language or policies of either Rule 68 or §1988, is contrary to the decisions of other courts considering the question, and should be reversed.

ARGUMENT

WHEN A PLAINTIFF HAS REJECTED A VALID OFFER OF JUDGMENT UNDER RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND HAS RECOVERED LESS THAN THE OFFERED AMOUNT AT TRIAL, THE PLAINTIFF IS NOT ENTITLED TO RECOVER HIS ATTORNEY'S FEES UNDER 42 U.S.C. §1988 FOR LEGAL WORK PERFORMED AFTER THE OFFER OF JUDGMENT.

INTRODUCTION

Plaintiff seeks his attorney's fees under 42 U.S.C. §1988 for work performed after rejecting a valid Rule 68 offer of judgment which included attorney's fees, when less than the total amount offered was recovered at trial (hereinafter the "less prevailing plaintiff"). Based upon Rule 68 Fed.R.Civ.P., defendant challenges plaintiff's entitlement to fees under 42 U.S.C. §1988.

In 42 U.S.C. §1988, Congress empowered the courts to allow a prevailing party in civil rights litigation "a reasonable attorney's fee as part of the costs." Under Rule 68, Fed. R.Civ.P., after rejection of an offer of judgment, if "the judgment finally obtained by

the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer" (emphasis added). Consequently, defendant should not be required to pay plaintiff's attorney's fees incurred after the offer of judgment.[1]

CHESNY, WATERS, AND BITSOUNI - DECISIONS CONSIDERING THE IMPACT OF RULE 68 UPON THE ATTORNEY'S FEE PROVISIONS OF THE CIVIL RIGHTS ACT.

While the question of attorney's fees as costs has arisen in a number of other contexts, the instant appeal involves the first decision to pass upon the specific question of Rule 68's impact upon the attorney's fee provision of §1988. Here the court of appeals

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1 The issue is whether plaintiff's attorney's fees are barred; it is not whether plaintiff may be required to pay defendant's fees. Fee questions arise under Rule 68 only when a statute authorizes the recovery of fees as costs. Cf., Pigeaud v. McLaren, 699 F.2d 401, 404 (7th Cir. 1983) (Rule 68 costs do not include attorney's fees in the absence of statutory entitlement thereto.) To be entitled to recover fees under §1988, one must be a prevailing party.

(footnote continued on the next page)

reversed the district court's determination that Rule 68 barred the recovery of §1988 attorney's fees for post-offer of judgment legal work in the less prevailing plaintiff situation, and held that plaintiff would be allowed to recover attorney's fees for work performed after the offer of judgment even though plaintiff recovered less than the offered amount at trial. Chesny, 720 F.2d at 478-480.

The court of appeals grounded its decision upon a belief that barring recovery of fees for post-offer work would have a deterrent impact upon civil rights litigation, and would

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As the district court noted, Rule 68 operates only when a plaintiff has made some recovery, so a defendant seeking the benefits of Rule 68 would never be a prevailing party under §1988 entitled to the recovery of any fees. Chesny, 547 F.Supp. at 547. Cf., Delta Air Lines, Inc. v. August, 450 U.S. 346, 67 L.Ed. 2d 287, 101 S.Ct. 1146 (1981) (Rule 68, Fed. R.Civ.P., does not apply when judgment is entered against the plaintiff and in favor of the defendant).

cut "across the grain of section 1988." Id. at 479. Upon analysis, the court's reasoning fails, however. Nothing contained within §1988 or its legislative history requires the payment of attorney's fees for post-offer of judgment legal work in a less prevailing plaintiff situation.

Section 1988 was designed to insure civil rights litigants access to competent counsel in an effort to encourage private enforcement of a public policy against illegal discrimination. See, e.g., Blum v. Stenson, __U.S.__, 79 L.Ed.2d 891, 900, 104 S.Ct. __ (1984); and Hensley v. Eckerhart, __U.S.__, 76 L.Ed.2d 40, 48, 103 S.Ct. 1933, 1937 (1983). By its terms, however, §1988 limits the recovery of legal fees to prevailing parties. This limitation on fee recovery underscores Congress's intent to encourage the vindication of civil rights abuses by rewarding only successful litigants. Regardless of any mitigating factors, there is no authorization for the recovery of

any fees by an unsuccessful plaintiff. As the Court stated in Hensley:

> Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

76 L.Ed.2d 52.

A plaintiff who refuses a reasonable offer of judgment, and then at trial recovers less than offered, while still a prevailing party, is unquestionably less of a prevailing party than he would have been if he had accepted the offer. The legal efforts expended between the offer of judgment and the conclusion of the trial netted the plaintiff nothing. For that portion of the case (including trial efforts) the plaintiff may be said to be a non-prevailing party. Although §1988 does mandate that there should be recovery of some legal fees in this situation, it is certainly in accord with the goals and policies underlying the statute to deny fees for post-offer

of judgment work in situations where such unnecessary work produces nothing. Accordingly, the court of appeal's conclusion that a bar on the recovery of fees would cut "across the grain of section 1988" is without foundation.[2]

The court of appeal's belief that a bar on the recovery of fees for useless post-offer of judgment work in these situations will have a deterrent impact upon civil rights litigation is also without support. As a practical matter, it is extremely unlikely that an attorney would be deterred from bringing a civil rights action because of the possibility that he might receive a reasonable offer of settlement, reject it,

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[2] As the Court stated in Blum v. Stenson, U.S.__, 79 L.Ed.2d 891, 900, 104 S.Ct. __ (1984): "The legislative history explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys'" (citation omitted).
(footnote continued on next page)

and then at trial recover less than offered. Rather than concern over the risk of losing fees, the attorney should be glad to be able to vindicate his client's rights without the necessity of going to trial. Furthermore, one has only to look at the practical applications of permitting the recovery of fees in this situation to see that such a decision is fraught with peril.

Any attorney, in a Chesny position faced with an offer of settlement, knows and will be thinking, consciously or unconsciously, that regardless of the reasonableness of the settlement offer, all he need do is win some-

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In the same vein, in Hensley v. Eckerhart, U.S.__, 76 L.Ed.2d 40, 59, 103 S.Ct. 1933, 1947 (1983) (Brennan, J., dissenting), it is stated: "If attorneys representing civil rights plaintiffs do not expect to receive full compensation for their efforts when they are successful, or if they feel they can 'lard' winning cases with additional work solely to augment their fees, the balance struck by §1988 goes awry."

thing at trial; even though the recovery is less than the offer, he still will be entitled to fees for all work performed on the prevailing issues, regardless of the benefit to his client.

The facts of the case sub judice are illustrative. Plaintiff's counsel's work prior to the offer of judgment amounted to only thirty-two thousand dollars ($32,000.00); by the conclusion of trial, counsel's fees had escalated to more than one hundred seventy thousand dollars ($170,000.00). Chesny, 720 F.2d at 478 and 480. For the unnecessary legal work performed between the offer of judgment and the jury's verdict, plaintiff requested over one hundred forth thousand dollars ($140,000.00); meantime, the jury's verdict on the damage claim was for sixty thousand dollars ($60,000.00). Id. at 476.

It is very easy to imagine even the best intentioned attorney in a Chesny settlement posture being flooded with "reasons" why his

client will benefit from protracted litigation rather than settlement. In this situation not only is settlement discouraged, unnecessary litigation is invited. Also, the earlier and more reasonable offers are the most discouraged. A reasonable offer would encourage plaintiff's attorney in a belief he can succeed at trial; while the earlier the offer, the more the attorney stands to "lose" by accepting the offer.

However cynical this analysis may seem, it is supported by the fact of extremely large civil rights attorney fee awards. As a practical matter, it may be expecting too much to believe that an attorney would not be affected by the prospect of receiving fees of $170,000.00 rather than $32,000.00

Although the stated objective of the court of appeals was to further the goals of §1988, the opposite has occurred. Not only are the results obtained under Chesny unrelated

to any legislative policy of §1988, but a potential conflict of interest is created between the attorney and his client which could undermine the entire attorney-client relationship. The decision of the court of appeals should be reversed and the Court should hold that a less prevailing plaintiff may not recover fees for post-offer of judgment legal work.

The district court, in its well-reasoned opinion, set forth in summary fashion the grounds for its decision that a less prevailing plaintiff should be barred from recovering attorney's fees for post-offer legal work. Chesny, 547 F.Supp. at 547. First, the district court stated that the decision would be "consistent with the literal language of Rule 68 and Section 1988," and noted agreement with the decision in Waters v. Heublein, 485 F.Supp. 110 (N.D. Cal. 1979). Second, the court recognized that the bar on post-offer fees would "stimulate realistic settlement

efforts before trial." Finally, even though the court realized counsel for plaintiff would be facing the risk of losing statutory fees for post-offer work, the court refused to "adopt the wrong rule because the right one may have a harsh application in a few cases." Ibid.

The decision of Waters v. Heublein, Inc., 485 F.Supp. 110 (N.D. Calif. 1979), relied upon by the district court, also involved the question of whether attorney's fees should be barred under Rule 68. There, however, the question arose under the fees provision of Title VII, 42 U.S.C. §2000e-5(k).[3] Just as

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[3] The fees provision of Title VII, 42 U.S.C. §2000e-5(k), contains language almost identical to that found in §1988, and the Court has recognized that §§1988 and 2000e-5(k) are closely related and intended by the legislature to be treated the same generally. Hensley v. Eckerhart, __U.S.__, 76 L.Ed.2d 40, 50, 103 S.Ct. 1933, 1939, n. 7 (1983); and Roadway Express, Inc., v. Piper, 447 U.S. 752, 758, 65 L.Ed.2d 488, 496, 102 S.Ct. 2455, 2460, n. 5 (1980).

the district court here did, the court in Waters determined that a less prevailing plaintiff should be barred from recovering post-offer of judgment fees.

In its analysis of the question, the Waters court reasoned that barring the recovery of fees for post-offer of judgment work furthered the policy behind Rule 68 without unduly interfering with the policy of awarding fees to successful civil rights plaintiffs. Specifically, the court stated:

> Since the pre-offer efforts of the attorney reached a result more favorable to the client than the verdict, there seems little reason to reward that attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits. Thus, this application of the Rule should work to further the legitimate conerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation.

Id. at 114-115.

Similarly, in Bitsouni v. Sheraton Hartford Corp., Civil No. H 77-337 (D. Conn. Nov. 28, 1983), (App. 1), the court refused

to allow a less prevailing plaintiff any §2000e-5(k) attorney's fees for post-offer legal work. Although the court was very concerned over the possibility that a plaintiff could be held liable for a defendant's legal fees, it had no hesitancy in barring the recovery of plaintiff's fees. Id. at 2355. (App. p. 18).

The court of appeals stands alone in its belief that §1988 fees are not costs under Rule 68, and that a less prevailing plaintiff should be able to recover post-offer fees. The other courts considering the question have accorded the language of Rule 68 and §1988 its plain and proper meaning, and have determined that §1988 fees are included within Rule 68's costs, and that the recovery of fees in a less prevailing plaintiff situation is barred by Rule 68.

SUPREME COURT DECISIONS CONSIDERING THE QUESTION OF ATTORNEY'S FEES AS COSTS IN RELATED CONTEXTS

On two occasions, with differing results, the Court has considered the question of attorney's fees as costs.[4] In Roadway Express, Inc. v. Piper, 447 U.S. 752, 65 L.Ed.2d 488, 100 S.Ct. 2455 (1980), the Court held that attorney's fees authorized by the civil rights statutes, 42 U.S.C. §§1988 and 2000e-5(k), were not costs under 28 U.S.C. §1927. In Hutto v. Finney, 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978), the Court held that §1988 attorneys fees were costs and as such were assessable against the States even without an express Congressional abrogation of the States' Eleventh Amendment

[4] In White v. New Hampshire Department of Employment Security, 455 U.S. 445, 454, n.17, 71 L.Ed.2d 325, 333, 102 S.Ct. 1162, 1168 (1982), the Court expressly declined to decide whether attorney fee requests are motions for costs under Rule 54(d) and 58, Fed.R.Civ.P.

immunity. The issue in Piper is readily distinguishable from the instant question; it is the Court's decision in Hutto that bears upon the issue presently before the Court.

In Piper, the question of attorney's fees as costs was presented to the Court in the context of whether the civil rights attorney's fee provisions, 42 U.S.C. §§1988 and 2000e-5(k), read together with 28 U.S.C. §1927[5] authorized a court to assess defendant's counsel's fees against plaintiff's counsel. Piper, 447 U.S. at 756. The Court concluded fees could not be assessed against plaintiff's counsel under these circumstances.

[5] Title 28 U.S.C. §1927 provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

In deciding against the inclusion of attorney's fees as part of §1927's costs, the Court thoroughly reviewed the varing purposes underlying each of the provisions, and stated:

> The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy. Unlike §1927, both §1988 and §2000e-5(k) restrict recovery to prevailing parties. In addition, those provisions have been construed to treat plaintiffs and defendants somewhat differently. . . .
>
> But §1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes.

447 U.S. at 762. Therefore, since §1927 was punitive in nature and directed at the attorney rather than the party, while the civil rights provisions were keyed entirely to the parties and the merits of the action, the Court determined §§1988 and 2000e-5(k) attorney's fees could not be costs under §1927. But as the above analysis suggests,

it was the incompatability between the statutes that required the result, not any magic in the words "fees" or "costs".

For the very reasons the Court decided civil rights attorney's fees were not costs under §1927, the Court should find they are costs under Rule 68. Rule 68, unlike §1927, is tied to the merits of the action; as with §1988, its application is limited to prevailing parties. Just as §1988 discourages unnecessary litigation by not allowing fee awards to unsuccessful plaintiffs, so Rule 68 furthers the goal of judicial economy by shifting the burden of costs to the party who refuses good faith settlement offers. The incompatability that the Court was confronted with in Piper is not present here. A determination that Rule 68 costs includes §1988 attorney's fees furthers the goals of both the Rule and the statute.

In Hutto v. Finney, 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565 (1978), where the

question of attorney's fees as costs came up in the context of the Eleventh Amendment to the Constitution and a state's right to be free from suit in federal court absent waiver or abrogation of its sovereign immunity, the Court stated, not once, but repeatedly that attorney's fees are costs.

First the Court quoted with approval from §1988's legislative history:

> "[I]t is intended that the attorneys' fees, <u>like other items of costs</u>, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

437 U.S. at 694, quoting from S.Rep.No. 94-1011, p.5 (1976) (emphasis added).

The Court goes on to state:

> The Act imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court.

<u>Id</u>. at 695.

With barely a pause, the Court next stated:

> A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant and in imposing costs upon it' when an award is called for.
>
> Just as a federal court may treat a State like any other litigant when it assesses costs, <u>so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does all other litigants</u>, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever <u>a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs</u> (citation omitted) (emphasis added).

<u>Id</u>. at 696-697.

Finally, the Court stated:

> It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity.

<u>Id</u>. at 698.

Although, when the question of attorney's fees as costs comes up, <u>Hutto</u> is usually dis-

tinguished because it arose in the context of sovereign immunity and is somehow not conclusive, by its language the decision certainly appears to be conclusive.[6] Furthermore the question could not have arisen under more serious circumstances. The states' immunity from suit in federal court is constitutionally protected; a decision in this context should carry more weight, not less.

There is an expection that within the confines of the judicial system a certain

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[6] Lower courts that have considered the question are in accord in holding that attorney's fees are costs. See, Fulps v. City of Springfield, Tennessee, 715 F.2d 1088 (6th Cir. 1983)(holding that the language "plus costs accrued to date" in an offer of judgment in a civil rights action included an offer to pay attorney's fees); Greenwood v. Stevenson, 88 F.R.D. 225 (D.Rhode Island 1980)(where the court agreed with the decision in Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Calif. 1979) but felt bound by the First Circuit decision in White v. New Hampshire Department of Employment Security, F2d 697 (1st Cir. 1980), since reversed at 455 U.S. 445, 71 L.Ed.2d 325, 102 S.Ct. 1162 (1982); and Scheriff v. Beck, 452 F.Supp. 1254 (S. Colo. 1978)(in a civil rights action, an offer to pay costs under Rule 68 must include attorney's fees.)

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equity will inhere. There is a fundamental unfairness in telling a state that a plaintiff may recover his attorney's fees as costs, and that the state is not immune from paying the fees because they are costs, but that the state cannot toll the amassing of these fees through good faith attempts to settle an action because the attorney's fees are not costs. The Court should not permit such an injustice to occur; it should follow the lead of Hutto and again hold that §1988 attorney's fees are costs, and

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See also, Baldwin Cooke Company v. Keith Clark, Inc., 73 F.R.D. 564, (N.D. Ill. 1976) and Honea v. Crescent Ford Truck Sales, Inc. 394 F.Supp. 201 (E.D. La. 1975)(Where the courts, in dicta, assume attorney's fees would be barred under Rule 68).

But, cf., Cruz v. Pacific American Insurance Corporation, 337 F.2d 746 (9th Cir. 1974)(an action on a policy of insurance, where the court held an offer to pay costs, did not require defendant pay plaintiff's attorney's fees as part of costs); and, Gamlen Chenical Co. v. Dacar Chemical Procucts Co., 5 F.R.D. 215 (W.D. Pa. 1946)(an action arising under the copyright laws, where the court held an offer to pay costs did not include an offer to pay attorney's fees).

that a less prevailing plaintiff is not entitled to the recovery of post-offer of judgment legal fees.

The question of attorney's fees as costs was also discussed in Delta Air Lines, Inc. v. August, 450 U.S. 346, 67 L.Ed.2d 287, 101 S.Ct. 1146 (1981). While the majority opinion contains no consideration of the question of attorney's fees as costs, Justice Powell, in his concurring opinion, states succintly:

> A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party. It follows, therefore that the 'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer.

The purposes of Title VII and Rule 68 each would be served by this plain-language construction of the relationship between the statute and the Rule. To be sure, Title VII's fee provision was designed to enable plaintiffs to vindicate their rights through litigation. On the other hand, parties to litigation and the public as a whole have an interest -- often an over-

> riding one -- in settlement rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits.

450 U.S. at 363. (emphasis added) (citation omitted).

As Justice Powell recognized, Rule 68 encourages parties to settle lawsuits. The sanction necessary to achieve that result is the cost-shifting provision. To get the benefit of this sanction, a defendant, among other things, must be willing at the time of the offer to pay plaintiff's accrued costs. In a civil rights situation, the willingness to pay costs must include a recognition of the requirement to pay reasonable attorney's fees.[7]

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[7] In the dissent, the argument is made that, in 1938, when Rule 68 was promulgated, costs did not typically include attorney's fees. 450 U.S. at 376-377. While this point has validity when raised with respect to §1927, a punitive statute that the legislators most probably did not have on their minds at the time the civil rights laws were enacted in 1976, it is considerably less apropos here when raised with regard to the Federal Rules of Civil Procedure. It is extremely unlikely that when enacting the civil

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As a result, the defendant should receive the benefit of the Rule when Plaintiff's recovery is less than the offer of judgment, and plaintiff's fees for the post-offer work should not be allowed.

CONCLUSION

A practical problem has been presented to the Court involving the everyday practice of law. It calls for a pragmatic, common sense approach that fairly interprets the provisions of the civil rights laws and Rule 68, and permits the civil rights defendant a reasonable means to attempt in

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rights laws and designating attorney's fees as costs, Congress did not intend that the Federal Rules of Civil Procedure apply.

Also concern is expressed that a determination that fees are costs will impede a defendant's ability to settle civil rights actions. Id. at 379. But as is discussed supra, p.9-11. unless the court of appeals is reversed, there will be no more settlements in civil rights actions.

good faith to resolve an action through settlement. This result can only be achieved by reversing the court of appeals and holding that a less prevailing plaintiff is not entitled to the recovery of fees for work performed after the offer of judgment.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SOULA BITSOUNI

v. CIVIL NO. H 77-337

SHERATON HARTFORD CORP.

APPEARANCES:

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RULING ON APPLICATION FOR
ATTORNEY'S FEES AND COSTS

JOSE A. CABRANES, District Judge:

At the trial of this action, plaintiff prevailed on her claim that she had been wrongfully discharged from her position as a bellhop at defendant's Hartford hotel as a

result of sex discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), and she recovered damages in the amount of $171.10. The second count of her complaint, under Conn. Gen. Stat. §31-126(a)(now Conn. Gen. Stat. §46a-60), was dismissed on the ground that the statute created no private right of action beyond a complaint to the Connecticut Commission on Human Rights and Opportunities. See Memorandum of Decision, filed August 3, 1983. Since she prevailed on her employment discrimination claim, it appears that plaintiff is entitled to the award of a reasonable attorney's fee under 42 U.S.C. §2000 e-5(k) and costs under Rule 54(d), Fed.R.Civ.P.

On August 16, 1983, plaintiff's counsel submitted an Application for Allowance of Fees, requesting $8,918.65 for attorney's fees and $458.90 for costs. Defendant objects first, that both requests are "clearly excessive" in light of plaintiff's limited recovery, and second, that in any event plaintiff's award of

fees and costs must be limited by defendant's offer of judgment under Rule 68, Fed.R.Civ.P., tendered on August 23, 1982, and subsequently refused by plaintiff. In addition, defendant objects to the taxation of certain specific expenses as "costs."

I.

The award of fees in this case must initially be governed by the standards most recently enunciated by the Supreme Court in Hensley v. Eckerhart, 103 S.Ct. 1933 (1983). While Hensley v. Eckerhart itself concerned a fee award under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. §1988, the Court stated that the standards it set forth are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 103 S.Ct. at 1939 n.7. A district court has discretion in determining the amount of a fee award, but it must provide an explanation of its reasons. Id. at 1941. Particularly where an adjustment is requested

because of the exceptional or limited nature of the relief obtained, the court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained. Id. at 1941-42 & n.14. Although no precise formula governs the fee determination, id. at 1941, where a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be excessive. Id. at 1940. Moreover, although "the most critical factor is the degree of success obtained," id. at 1941, the term "degree of success" has not yet been definitively construed.

In this case, plaintiff prevailed on Count I of the complaint, her federal civil rights claim. She did not succeed on Count II, the state law claim, which was dismissed for the reason noted above. Because plaintiff was not the "prevailing party" with respect to Count II, it is appropriate to reduce the fee award by the

amount of the charges claimed for work on Count II. The record does not suggest that much, if any, additional time was spent in preparing or trying Count II above and beyond that which was necessary for preparation or trial of Count I. Thus, only time spent drafting Count II will be subtracted. Inasmuch as Count II and its self-contained prayer for relief constitute one-half of the complaint, and two hours are claimed for drafting the complaint as a whole, the court will reduce the number of hours compensated by one hour (charged at the rate of $60).

The court does not agree with defendant's assertion that Hensley v. Eckerhart requires the court to award a fee which is less than that requested merely because plaintiff recovered only $171.10. See Supplemental Memorandum in Opposition to Attorney's Fees (filed Oct. 3, 1983) at 10. As the court's August 3, 1983 Memorandum of Decision made clear, the amount of the compensatory damage

award was based on the evidence of plaintiff's earnings record and of her alternative employment, which served to mitigate actual damages. To reduce the requested award because the amount of damages recovered was small would be to reward defendant for plaintiff's diligence in seeking alternative employment after her wrongful dismissal. This the court declines to do. As Judge Kaufman wrote for our Court of Appeals in affirming a district court's award of almost $50,000 to a major New York City law firm that had obtained a recovery of nominal damages of $1 for its clients in an action under 42 U.S.C. §1983,

> [t]the policy underlying the statute is to encourage litigants to assume the role of a private Attorney General. This policy may be served by granting a fee request even where a plaintiff is unable to prove actual damages resulting from his constitutional deprivation.
>
> * * *
>
> The fact that a plaintiff is awarded only nominal damages does not indicate that he has been unsuccessful or has not prevailed on his claim. Accordingly, the district

> court did not err in declining to reduce the requested fee award simply because [plaintiff] was awarded only $1 in nominal damages.

McCann v. Coughlin, 698 F.2d 112, 128-29 (2d Cir. 1983).

While there is no guarantee that the result in McCann would have been precisely the same if it had been decided after Hensley v. Eckerhart, the court believes that the general reasoning of McCann is still sound when applied to the facts of the instant case. The number of hours and the rates charged appear, moreover, to be reasonable. It is true that contemporaneous time records are now required in this Circuit for work performed after June 15, 1983, New York State Association for Retarded Children, Inc. v. Carey, No. 82-7531, slip op. 4563, 4583-4584 (2d Cir. June 15, 1983), but reconstructed records for work done before that date are acceptable. Birmingham and Morano v. SoGen-Swiss International Corp. Retirement Plan et al., No. 82-7934, slip op. 6483, 6499-6500

(2d Cir. Sept. 14, 1983). In any event, at oral argument on this application, defense counsel specifically waived any objection to the lack of contemporaneous documentation of time spent.

II.

Defendant's second objection to an award of fees and costs in the amount claimed stems from its offer of judgment pursuant to Rule 68, Fed.R.Civ.P.[1] On August 23, 1982, defendant offered to allow judgment to be taken against it in the amount of $2000, with costs accrued to that date. Plaintiff did not accept the offer, and the case was tried to the court on September 21, 1982. Because its rejected offer of judgment exceeded plaintiff's eventual recovery when she prevailed on Count I, defendant asserts that the award of costs and attorney's fees must be limited to those incurred on or before August 23, 1982. Defendant's Memorandum in Opposition to Application for Attorney's Fees (filed Sept. 12, 1983) at 8, 10.

Section 706 of Title VII of the Civil Rights Act of 1964 states that

> In any action or proceeding under his subchapter the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs . . .

42 U.S.C. §2000e-5(k) (emphasis supplied).

Our Court of Appeals has not addressed the question whether, in a civil rights action, the term "costs" for the purposes of Rule 68 includes attorney's fees, as it clearly does in the context of the fee-shifting provision of Title VII. The justices who discussed the issue in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), came to diametrically opposite conclusions. Justice Powell thought that "the 'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer," 450 U.S. at 362, while Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, saw "[n]othing in the fee-shifting provisions of [the civil rights]

statutes or their legislative history . . . which would suggest that Congress intended to amend Rule 68 by adding attorney's fees to otherwise taxable 'costs' under that Rule." 450 U.S. at 377.

Given the indefiniteness of the signals from the Supreme Court, it is not surprising that the courts of appeals which have addressed the issue have also divided on the question. The Seventh Circuit has rejected Justice Powell's position that "costs then accrued" under Rule 68 were equivalent to "costs" under the fee-shifting provisions of the civil rights acts, and thus included attorney's fees. Pigeaud v. McLaren, 699 F.2d 401, 402-03 (7th Cir. 1983). The Sixth Circuit, on the other hand, has recently adopted Justice Powell's view. Fulps v. City of Springfield, Tennessee, No. 82-5313, slip op. at 4-13 (6th Cir. Aug. 25, 1983). District courts addressing the issue have also divided. See, e.g., Waters v. Heublein,

485 F.Supp. 110 (N.D. Cal. 1979) and Scheriff v. Beck, 452 F.Supp. 1254 (D. Colo. 1978) (attorney's fees are included in "costs then accrued" for Rule 68 purposes in civil rights cases); Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980) (agreeing with Justice Powell's view but constrained to hold against it).

That there is a trend towards using fee-shifting to promote settlement can be infered from the fact that the Judicial Conference Advisory Committee on Civil Rules proposed on August 23, 1983 that Rule 68, Fed. R. Civ. P., be amended to be entitled "Offer of Settlement," and to state, inter alia,

> If the judgment finally entered is not more favorable to the offeree than an unaccepted offer that remained open 30 days, the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer, and interest from the date of the offer on any amount of money that such a claimant offered to accept to the extent such interest is not otherwise included in the judgment.

52 U.S.L.W. 2144 (Sept. 13, 1983)(emphasis in the original).[2]

If the above-quoted proposal were the law governing the case at bar, plaintiff, having rejected defendant's settlement offer (assuming, arguendo, that it had been open for the requisite length of time), would seemingly have to pay the attorney's fees incurred by defendant after the offer was made. Such a change in the law would effect a significant departure from the so-called "American Rule," which requires litigants to bear their own litigation expenses and attorney's fees absent statutorily authorized fee-shifting or the exceptional circumstances of the creation of a common fund by plaintiff, a litigant's willful disobedience of a court order, or the losing party acting wantonly, vexatiously, in bad faith, or for oppressive reasons. See Alyeska Pipeline Service Co. v. Wilderness Society et al., 421 U.S. 240 (1975).

If the court read the phrase "with costs then accrued" in the present Rule 68 to include attorney's fees, as Justice Powell has suggested, it would seem appropriate to adopt the same reading for the phrase "the costs incurred after the

making of the offer." If one were to adopt Justice Powell's position, defense counsel could logically have argued that Rule 68 as it now stands requires plaintiff to pay the attorney's fees of defendant which were incurred after the making of the offer of judgment. However, since defense counsel did not request an award of costs (including attorney's fees) incurred after the making of the offer of judgment, the court need not reach the question whether, under present law, plaintiff-offeree must pay defendant-offeror's attorney's fees incurred after the offer as part of the "costs."[3]

It should be noted that this construction of Rule 68, which approximates the proposed amended form of Rule 68, would significantly undermine the objectives of the fee-shifting provisions of the civil rights laws in any case with facts resembling those in the case at bar. Specifically, the policy underlying the cost-and-fee-shifting provision of Rule 68 (to encourage settlement)

would conflict directly with the policy underlying the fee-shifting provisions of the civil rights laws (to encourage private plaintiffs to litigate civil rights violations). In considering these conflicting policies, the court is mindful of Justice Brennan's admonition that "lower courts must not forget the need to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them." Hensley v. Eckerhart, supra, 103 S.Ct. at 1945 (Brennan, J., concurring in part and dissenting in part).

In the words of the Senate Commerce Committee, the various civil rights laws enacted by Congress over the last two decades were designed primarily to solve the problem of "the deprivation of personal dignity" that accompanies discrimination on account of race, sex, or age, in denials of equal access to public establishments or to the polls, or of equal opportunity in education or

employment. S. Rep. No. 872, 88th Cong. 2d Sess., 16. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring). As the Supreme Court has repeatedly stated, Congress enacted the provisions for counsel fees in the civil rights laws to encourage individuals injured by discrimination to seek judicial relief. See, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02 (1967)(per curiam). The private plaintiff who brings a civil rights action is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 412, 418(sic), quoting Newman v. Piggie Park Enterprises, supra, 390 U.S. at 402. Indeed, the civil rights statutes have come to occupy a fundamental place in protecting the ideal of equality under the law on which our society was founded and to which it aspires.

Against the backdrop of congressional priorities expressed in the civil rights laws' fee-shifting provisions, it seems incongruous to require that a successful civil rights plaintiff pay defendant's attorney's fees incurred after an offer of judgment is not accepted, if the recovery amounts to less than the offer. It would provide strong incentives for plaintiffs' attorneys to settle civil rights cases, possibly for less than they were worth, and substantial disincentives for attorneys to undertake problematic or difficult cases, even where significant civil rights violations are alleged in good faith. Not least, it would generally undermine the role in our society of the private attorney general as a significant agent in vindicating civil rights violations. As Justice Stewart wrote for a unanimous Court in Christiansburg Garment Co.,

> to take the . . . step of assessing attorney's fees against plaintiffs would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the rigorous enforcement of the provisions of Title VII.

434 U.S. at 422.

The resulting harm to the enforcement of the civil rights laws would far outweigh the possible gain in efficiency and conservation of judicial resources that such additional fee-shifting might have in deterring the prosecution or encouraging the settlement of non-meritorious litigation generally. Therefore, while the proposed amendment to Rule 68, with its express fee-shifting provision, would probably advance the generally desirable end of promoting settlements, it may effectively undermine (perhaps inadvertently) fee-shifting schemes deliberately adopted to advance the fundamental and salutary objectives of the civil rights laws.

All of these concerns -- including the fact that the proposed amendments to Rule 68 have not yet been adopted -- indicate that in cases brought in good faith (such as the instant case) the phrase in Rule 68, "the costs incurred after the makning of the offer," like the phrase "with costs then accrued," should be construed to include only plaintiff's attorney's fees. This

construction has two consequences. First, an offer of judgment in a civil rights case will naturally include in the "costs" a reasonable attorney's fee incurred by plaintiff to the time of the offer. Second, if the offer is not accepted and the prevailing party recovers less than was available to him in the offer of judgment, as in this case, costs and fees incurred by plaintiff after theoffer of judgment (i.e., in litigating the claims to the less successful conclusion) will be borne by the plaintiff.

Accordingly, in this case, where plaintiff refused defendant's offer of jdugment of $2000.00 plus costs accrued to the date of the offer, and plaintiff on her claim but only recovered $171.10, plaintiff's award of a reasonable attorney's fee and costs under the fee-shifting statute and Rule 54(d), Fed. R. Civ. P., will not include the fees and costs incurred after the making of the offer of judgment of August 23, 1982.

III.

Defendant has challenged certain specific expenses which plaintiff's attorney has requested to be taxed as costs against defendant: specifically, attorney's travel expenses and lodging, incurred in connection with taking a deposition, computer reserach expenses and photocopying expenses. See Defendant's Memorandum in Opposition to Application for Attorney's Fees (filed Sept. 12, 1983) at 11-12; Supplemental Memorandum in Opposition to Application for Attorney's Fees (filed Oct. 3, 1983) at 11-14.

Since the charges for computer research and photocopying were incurred after the offer of judgment of August 23, 1982, and the court has ruled that costs incurred by plaintiff after the offer of judgment will not be taxed against defendant under Rule 68, it is unnecessary to discuss the computer or photocopying charges further.

As to expenses for travel and lodging incurred in connection with the taking of depositions, it is clear that such expenses are not taxable as costs under 28 U.S.C. §1920. City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1371 (1st Cir. 1971); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1170 (7th Cir. 1968). See also 10 C. Wright and A. Miller, Federal Practice and Procedure, § 2676 at 338 n.12, § 2677 at 371 n. 51. There are no exceptional circumstances in this case to justify taxation of travel to and from a deposition such as existed in Haviland & Co. v. Montgomery Ward & Co., 31 F.R.D. 578, 580 (S.D.N.Y. 1962), nor was prior authorization for those expenses sought from the court. Accordingly, the court will not tax as costs the transporation and lodging expenses claimed by plaintiff's counsel.

CONCLUSION

In sum, the court approves the application for all of plaintiff's attorney's fees through August 23, 1982, expect for one hour spent

drafting Count II of the complaint; .1 hour at the rate of $30 per hour[4] (=$3.00); 7 hours at $50 per hour[5] (-$350.00); 28.16 hours at $60 per hour[6] (=$1689.00);12.15 hours at $80 per hour[7] (=$972.00); .3 hour at $85 per hour[8] (=$25.50); and 12.45 hours at $100 per hour[9] (=$1245.00), for a total of $4,284.50. See Application for Allowance of Fees (filed Aug. 16, 1983) and Affidavit of Robert L. Hirtle, Jr., re: Counsel Fees (filed Nov. 22, 1983). In addition, the court taxes against defendant statutorily authorized costs incurred through August 23, 1982 of $94.57. See Application for Allowance of Fees (files Aug. 16, 1983) and Affidavit of Robert L. Hirtle, Jr., re: Counsel Fees (filed Nov. 22, 1983).

It is so ordered.

Dated at Harford, Connecticut, this 28th day of November, 1983.

Jose A. Cabranes
United States District Judge

FOOTNOTES

1. Rule 68, Fed. R. Civ. P., states:

> At any time more than 10 days before trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.
>
> An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. (emphasis supplied).

2. Presumably, one object of the proposed change is to widen the narrow and literal reading of Rule 68 by the Supreme Court in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), holding that costs accrued after the making of an offer of judgment which was not accepted are not recoverable by a defendant-offeror who litigates the claim to a successful conclusion, but only by a defendant-offeror where the plaintiff-offeree ultimately prevails, but with less success than if he had accepted the offer of judgment.

3. The court assumes without deciding that the question would be governed by the Supreme Court's holding in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1977) that a prevailing defendant is only to be awarded attorney's fees in a Title VII proceeding when the plaintiff's action is frivolous, unreasonable, or without foundation (even though that case did not involve an offer of judgment under Rule 68).

4. For work done by Maureen E. McNamara, a paralegal in May 1982.

5. For time spent by Robert L. Hirtle, Jr., a partner, in traveling to and from Washington, D.C. in April 1980.

6. For work done by Robert L. Hirtle, Jr., a between February 1975 and October 1978, and by Joan C. Guiney, an associate, between May 1982 and August 1982.

7. For work done by Robert L. Hirtle, Jr., a partner, between September 1979 and April 1980.

8. For work done by Robert L. Hirtle, Jr., a partner, in March 1981.

9. For work done by Robert L. Hirtle, Jr., a partner between May 1982 and August 1982.